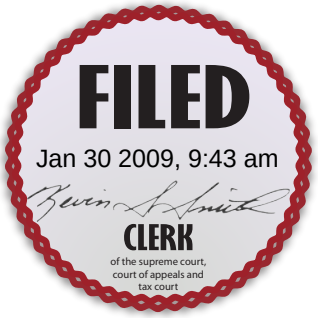

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IN THE
COURT OF APPEALS OF INDIANA

WENDY BYERS, M.D.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0805-CV-307
	)	
LINDA JEAN QUILLEN,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0710-PL-1233

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Wendy Byers, M.D., brings this interlocutory appeal from the trial court's order on summary judgment denying her motion for a preliminary determination of law against the claims of Linda Jean Quillen. Byers raises a single issue for our review, namely, whether Quillen timely filed her medical malpractice action against Byers.

We reverse.

FACTS AND PROCEDURAL HISTORY

Byers is an internal medicine specialist and became Quillen's primary care physician in February of 1998. In nearly every meeting between Quillen and Byers between December 8, 2000, and March 29, 2004,[1] Quillen complained of "bubbles" or crackling in her ears, dizziness, and/or a lack of coordination. See Appellant's App. at 51-59, 98-99, 137-38. Byers repeatedly attributed those symptoms to either sinusitis or stress. See id. at 51-59.

In March of 2004, Quillen informed her psychiatrist, Christopher Bojrab, of Byers' assessments of Quillen's symptoms. Bojrab ordered Quillen to undergo a CT scan on March 24, 2004, which returned normal results. Still concerned, however, Quillen requested a referral from Byers, and Byers referred Quillen to Todd Huntley, an otolaryngologist, for further evaluation.

[1] In her brief on appeal, Byers asserts that February 27, 2004, "was the last time that Ms. Quillen was physically seen by Doctor Byers prior to when she was informed of the correct diagnosis of her medical condition." Appellant's Brief at 8. But the record shows that Quillen continued to call Byers' office regarding ear pain and dizziness, and that Byers continued to respond to those complaints, through March 29, 2004. See Appellant's App. at 138.

Huntley evaluated Quillen on March 31, 2004. Huntley ordered an immediate MRI. The MRI revealed that Quillen's left auditory canal had a vestibular schwannoma, or acoustic neuroma, which is a benign tumor growing out of the balance and hearing nerves that supply the inner ear. On April 6, 2004, Dr. Scott Philips, an associate of Huntley's, informed Quillen of the diagnosis and that she would need to undergo surgery to remove the tumor. That same day, Quillen spoke with Byers about Huntley's diagnosis, and Byers referred Quillen to Dr. Richard Miyamoto, an ear, nose, and throat surgeon.

The next day, April 7th, Quillen met with Miyamoto. After being informed of treatment options, Quillen decided "surgery was . . . the best alternative since the tumor had already been affecting me so much and the symptoms had been there for so long already . . . ." Id. at 59. On June 22, 2004, Dr. Michael B. Pritz, a neurosurgeon, removed Quillen's vestibular schwannoma at the Indiana University Medical Center in Indianapolis. After the nine-hour surgery, Miyamoto informed Quillen that "the tumor was larger than he suspected from the MRI and had been growing for several years." Id. at 98. Quillen could not close her left eye after the surgery, had left facial nerve palsy, and permanently lost hearing in her left ear. It was at that time, according to Quillen, that she "learned that [she] had a malpractice claim" against Byers. Id.

On June 22, 2006, exactly two years after her surgery, Quillen filed with the Indiana Department of Insurance a medical malpractice complaint against Byers. Quillen alleged that Byers negligently failed to identify and diagnose the vestibular schwannoma. On October 30, 2007, Byers filed in the trial court her motion for a preliminary

determination of law on the question of the timeliness of Quillen's complaint. Quillen responded to that motion on February 1, 2008, and again on February 6. On March 17, the court held a hearing on the motion, and on March 25 the trial court denied Byers' motion, stating that "[a] question of material fact exists with regards to when Linda Quillen possessed enough information to allow a reasonably diligent person to discover that Ms. Quillen had a medical malpractice claim against Dr. Wendy Byers." Id. at 4. The court certified its order for interlocutory appeal, which we accepted.

DISCUSSION AND DECISION

The only issue raised on appeal is whether Quillen filed her complaint within the two-year statute of limitations for medical malpractice actions. See Ind. Code 34-18-7-1(b) (2004). The entry of summary judgment on a motion for a preliminary determination is subject to the same standard of appellate review as any other entry of summary judgment. Boggs v. Tri-State Radiology, 730 N.E.2d 692, 695 (Ind. 2000).

> The standard of appellate review of a summary judgment ruling is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. When the moving party asserts the statute of limitations as an affirmative defense, however, and establishes that the action was commenced beyond the statutory period, the burden shifts to the nonmovant to establish an issue of fact material to a theory that avoids the defense.

Id. (citations omitted).

It is well-established that Indiana's statute of limitations for medical malpractice actions begins to toll from the date of the alleged malpractice, not from the date the

plaintiff discovered the alleged malpractice. See Martin v. Richey, 711 N.E.2d 1273, 1278 (Ind. 1999). "As such, an action for medical malpractice generally must be filed within two years from the date the alleged negligent act occurred rather than from the date it was discovered." Id. However, there is a notable exception to that rule: when the plaintiff "could not reasonably be expected to discover the asserted malpractice and resulting injury within the two-year period given the nature of the asserted malpractice and of her medical condition," Article I, Section 23 of Indiana's Constitution will "preclude the application of [the] . . . statute of limitations." Id. at 1282-84. That is, if the alleged malpractice cannot be discovered by the plaintiff within the limitations period because of a long latency in the plaintiff's medical condition, the two-year limitation will not apply to that plaintiff.

The "discovery" exception to Indiana Code Section 34-18-7-1(b) is a highly limited exception. As our Supreme Court has thoroughly explained:

> The plaintiff may or may not be immediately aware of an injury from an act of malpractice and also may or may not be aware that the injury was attributable to an act or omission by a health care provider. Unless a plaintiff is immediately aware of both, there will be a lag between the occurrence and the discovery of the claim. Thus, medical malpractice plaintiffs will frequently, if not virtually always, have varying amounts of time within which to file their claims before an occurrence-based statute of limitations expires. But that difference in time to file is not sufficient to create an impermissible classification under Article I, Section 23. All statutes of limitations are to some degree arbitrary. . . . As long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue. The relatively minor burden of requiring a claimant to act within the same time period from the date of occurrence, but with less time to decide to sue, is far less severe than barring the claim altogether.

> . . . We hold that as long as the statute of limitations does not shorten this window of time so unreasonably that it is impractical for a plaintiff to file a claim at all, . . . it is constitutional as applied to that plaintiff. The statute reflects a legislative judgment to define the class who may proceed as those who discover their claim in time to file within two years after the occurrence. That judgment is entitled to deference, and permits all within the class . . . to bring their case to court, if they choose to do so, within the statutory period.

Boggs, 730 N.E.2d at 697 (emphasis added). In Boggs, our Supreme Court held that "an 11-month window to file a medical malpractice claim after knowledge of the injury" was not an unreasonable shortening of the two-year limitations period. Id. at 697-98.

Here, Quillen alleges that Byers committed malpractice by failing to properly diagnose the vestibular schwannoma. "[W]hen the sole claim of medical malpractice is a failure to diagnose, the omission cannot as a matter of law extend beyond the time the physician last rendered a diagnosis." Havens v. Ritchey, 582 N.E.2d 792, 795 (Ind. 1991). Quillen contends[2] that the alleged malpractice "occurred in 2000 or 2001 when she had complained of dizziness, 'bubbles' in her ears and uncoordination [sic] for several visits." Appellant's App. at 85. As such, Quillen asserts that she could not have learned about that alleged malpractice until after her June 2004 surgery, more than two years after the date of the malpractice, and that applying the statute of limitations to her would therefore be unconstitutional.

Quillen misapplies Indiana Code Section 31-18-7-1(b) and its case law. Although Quillen first complained to Byers about bubbles in her ears, dizziness, and a lack of coordination in 2000, the record unambiguously demonstrates that she continued to

[2] Quillen's appellate brief is hardly clear on these arguments. However, these are the arguments she presented to the trial court, and we interpret her arguments on appeal accordingly.

complain of those symptoms to Byers through March 29, 2004. See Appellant's App. at 51-59, 98-99, 137-38. Because Quillen was aware of her symptoms and actively brought those symptoms to Byers' attention, her medical condition was not latent. Nonetheless, as Quillen continued to rely on Byers' advice and diagnoses, the last possible date the alleged malpractice could have occurred on was March 29, 2004. See Havens, 582 N.E.2d at 795.

Quillen concedes that she learned of the possible malpractice action against Byers following the June 22, 2004, surgery. Using March 29, 2004, as the last possible date of Byers' negligence, Quillen then had twenty-one months to file her malpractice action before the limitations period expired on March 29, 2006. She did not do so, and we cannot say that the twenty-one-month window was an unreasonably short time-frame. See, e.g., Boggs, 730 N.E.2d at 697-98. Thus, because Quillen did not file her malpractice action until June 22, 2006, more than two years after the last possible date of Byers' purported negligence, Quillen's action against Byers is untimely as a matter of law.

Finally, Quillen notes that "[w]ith all of her medical problems [following the June 2004 surgery], it would be unreasonable to expect [her] to file her claim against Dr. Byers any earlier than she did." Appellee's Brief at 9. On this point, we again follow our Supreme Court's language in Boggs:

> We are sympathetic to Boggs' complaint that it would have been difficult for him or Carolyn to file a claim while Carolyn was "fighting for her life." Indeed, seeking monetary compensation during such a time may be the furthest thing from a patient's mind. However, given that the statute of limitations for filing a medical malpractice claim is only two years,

> presumably many victims of malpractice who discover their claims immediately will also find it necessary to engage in litigation while battling their medical condition, fatal or not. That is a decision the legislature has made.

730 N.E.2d at 698 (footnote omitted).

We conclude that there is no genuine issue of material fact, that the last possible date on which Byers could have rendered a diagnosis was March 29, 2004, that Quillen's condition was not latent, and that the applicable two-year statute of limitations ran on March 29, 2006. Quillen did not file her claim against Byers until June 22, 2006. Thus, the trial court erred when it denied Byers' request for summary judgment based upon the statute of limitations.

Reversed.

BAKER, C.J., and KIRSCH, J., concur.